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Directive 03-6: Responsible Person Liability for Sales and Use Taxes

PURPOSE: This Directive replaces Directive 02-6.

BACKGROUND: Officers and employees of a corporation, and partners and employees of a partnership, may be held personally and individually liable for sales and use taxes assessed against the corporation or partnership if that entity fails to pay these taxes to the Commonwealth. The person determined to be personally and individually liable is called a responsible person.[1] This Directive states the Department's position that a responsible person is liable for all unpaid sales and use taxes assessed against a corporation or partnership.[2]

ISSUE : Is responsible person liability restricted to liability for sales or use taxes actually collected from customers of the corporation or partnership?

DIRECTIVE: No. There is no such limitation. The responsible person is liable for *all* sales and use taxes imposed upon the corporation or partnership under G.L. cc. 64H and 64I. Thus the responsible person is liable for a corporation's or partnership's unpaid sales and use taxes resulting from taxable retail sales the corporation or partnership made, regardless of whether the entity collected the tax or failed to do so. In addition, the responsible person is liable for sales taxes due from the entity under G.L. c. 64H, § 8(d) or 8(h) or the use taxes due under G.L. c. 64I, § 8(e) or 8(j), as well as use taxes due on the entity's purchases of tangible personal property for its own use.

DISCUSSION OF LAW:

Massachusetts law provides that certain persons may become "personally and individually liable" for failure to pay taxes owed by a corporation or partnership:

General Laws chapter 62C, section 31A provides in pertinent part:

If a person fails to pay the commissioner any required tax of a corporation or partnership and such person is personally and individually liable therefor to the commonwealth under . . . section sixteen of chapter sixty-four H or section seventeen of chapter sixty-four I, the commissioner shall so notify such person in writing . . . After the expiration of thirty days from the date of such notification, such person shall be personally and individually liable for the tax of the corporation or partnership . . .

Chapter 64H, section 16 and chapter 64I, section 17 provide in pertinent part:

Every person who fails to pay to the commissioner any sums required by this chapter shall be personally and individually liable therefor to the commonwealth. The term "person" as used in this section, includes an officer or employee of a corporation, or member or employee of a partnership, who as such officer, employee or member is under a duty to pay over the taxes imposed by this chapter.

Read together, these statutory provisions mandate that if a corporation or a partnership fails to pay to the Commissioner any tax liability imposed on it by G.L. c. 64H and 64I, the responsible person will be personally and individually liable for the amount of the required tax or taxes. *Commissioner of Revenue v. Brown*, 424 Mass. 42 (1997); *Berenson v. Commissioner of Revenue*, 413 Mass. 831 (1992).

Under chapter 64H, in addition to liability for sales tax collected from customers on retail sales, a

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corporation or partnership is liable for sales tax due on retail sales even though the business failed to collect the sales tax from its customers. See G.L. c. 64H, §§ 2, 3. In addition, a corporation is liable for sales taxes imposed under G. L. c. 64H, § 8(d) and (h) for property or services used inconsistently with a resale or exempt use certificate given at the time of purchase. Since sales tax liabilities imposed pursuant to these sections are required taxes under chapter 64H, the responsible person is liable if a corporation or partnership fails to pay them.

Chapter 64I imposes an excise on the use, storage or other consumption of tangible personal property in Massachusetts, unless otherwise exempt, G.L. c. 64I, § 2. Section 3 requires purchasers to pay the use tax due on their purchases directly to the Commissioner unless the taxes are paid to a vendor engaged in business in the Commonwealth. Section 4 requires vendors engaged in business in the Commonwealth to collect and remit the use tax due on purchases. In addition, under § 8(e) or (j), a use tax is due for property or services used inconsistently with a resale or exempt use certificate given at the time of purchase. Since use tax liabilities imposed by these sections are required taxes under chapter 64I, the responsible person is liable if a corporation or partnership fails to pay them.

EXAMPLES:

Example 1.

Seller is a small corporation selling medical supplies at retail. Most of its customers are doctors purchasing supplies used in the care of their patients, such as latex gloves, bandages, and alcohol swabs. Some doctors presented Seller with resale certificates for their purchases, which Seller accepted. As a result, Seller neither charged nor collected sales tax on those sales. Seller was subsequently audited and the auditors concluded that the resale certificates were not accepted in good faith. DOR then assessed Seller for the taxes due on those sales. Soon thereafter Seller went out of business. A responsible person determination was made against one of Seller's personnel who had the duty to pay the sales tax. The responsible person is liable for the all the sales tax due, including the sales tax liability resulting from uncollected sales tax.

Example 2

A corporation purchased items with an exempt use certificate at the time of the purchase; no sales tax was therefore collected. On audit, the corporation could not show that it had used the purchased property in an exempt manner. Accordingly, Audit concluded that, pursuant to G.L. c. 64H, § 8(h) sales taxes were due and assessed the corporation. The corporation's sales tax liability went unpaid for several quarters. A responsible person determination was made against the corporation's employees with the duty to pay the sales taxes. These persons are liable for all the corporation's sales tax liability, including the sales taxes resulting from liability imposed pursuant to G.L. c. 64H, § 8(h).

Example 3

A partnership purchased all of its computer hardware and software from an out-of-state vendor who was not obligated to collect Massachusetts tax. The partnership should have paid Massachusetts use tax on its purchases, but did not do so, and Audit subsequently assessed use tax against the partnership. The partnership's use tax liability went unpaid. A responsible person determination was made against the managing partner who had the duty to remit payment to the Commonwealth for the partnership's use tax liability. The responsible person is liable for the partnership's use tax liability resulting from partnership's purchases.

EFFECTIVE DATE:

This Directive restates the position of the Department with respect to responsible person liability for all sales taxes, except for sales taxes incurred under G.L. c. 64H, § 8(d) or § 8(h), and for use taxes actually collected from customers of the corporation or partnership. This portion of the Directive restating the Department's position applies to all responsible person determinations without regard to when the underlying liability was incurred. The Department's position with regard to these determinations has not changed.

The Directive clarifies the Department's position with respect to responsible person liability for sales taxes due under G.L. c. 64H, § 8(d) or § 8(h) only, for use taxes due under § 8(e) or § 8(j) of G.L. c. 64I, for use taxes due on purchases of the corporation or partnership on which no sales or use taxes were paid, and for use taxes due from customers but not collected. The portion of the Directive clarifying the Department's position will apply prospectively to all responsible person determinations made on or after May 30, 2002 and only for underlying liabilities for such taxes incurred by the corporation or partnership after that date.

/s/Alan LeBovidge
Alan LeBovidge
Commissioner of Revenue

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END NOTES:

1. The term "responsible person" throughout this Directive refers to an individual who meets the criteria required to determine that he or she is a responsible person under the statutory provisions cited herein and the Responsible Person Regulation, 830 CMR 62C.31A.1. [[return to text](#)]
2. The results of this Directive are also applicable to G.L. c. 62B, § 5, ¶ 2 and G.L. c. 64G, § 7B, which are similar provisions. [[return to text](#)]

August 7, 2003

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